Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on Cable Access Channels	MM Docket No. 92-258

COMMENTS OF CONTINENTAL CABLEVISION, INC.

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SUMMARY

Continental Cablevision, Inc. ("Continental") submits these comments to assist the Commission in its effort to implement Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"). We raise three primary points.

First, in adopting rules to permit cable operators to prohibit obscene and indecent programming on public, educational, or governmental ("PEG") and leased access channels, the Commission must balance the cable operator's potential liability for obscene programs against the desire to minimize editorial intrusion into PEG and leased access channels. To this end, the Commission should permit cable operators to rely on certifications by programmers and should further provide that such reliance constitutes an affirmative defense to liability. If the Commission does not provide such a defense, cable operators must be permitted to make their own determination regarding the possible obscene nature of programs carried on leased and PEG channels.

Second, the Commission should clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted.

Third, when structuring the single channel requirement for leased access channels, the Commission must adopt regulations that will preserve the local cable

operator's choice to prohibit or restrict indecent programming. If the regulations are unreasonable, unduly cumbersome or costly, the result will be a de facto ban on such programming in contravention of congressional intent and constitutional requirements. In particular, the Commission should adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient use of channel capacity, by requiring indecent programs to be aggregated together and scrambled on a single channel but permitting the remainder of the channel to be used for non-indecent and non-scrambled leased access programs, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to comply with the regulations, (4) require a 45-day notification requirement by leased access program providers of indecent programs to allow operator compliance with the single channel requirement, and (5) require a 30-day advance written notice of a subscriber's desire to change access to indecent programming.

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Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM"), Continental Cablevision, Inc. ("Continental") submits these comments on the proposed regulations implementing the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Act") relating to indecent and obscene programming.

INTRODUCTION

Continental, founded in 1963, is the third largest multiple cable system operator and the largest privately owned cable company in the United States. It serves nearly 2.9 million basic subscribers in 600 communities in 16 states, or roughly 5.5% of the nation's cable television households. Public, educational, or governmental access ("PEG") channels

are utilized in many of the communities Continental serves. Leased access channels are also available for commercial use.

Continental operates in a decentralized manner, permitting its operating regions considerable discretion and autonomy in operating their systems and determining how best to serve their customers. To that end, Continental believes its cable systems should, consistent with the letter and spirit of the Act, retain the option of adopting policies prohibiting indecent programs on leased access or PEG channels or restricting the dissemination of such programs consistent with the statutory and regulatory restrictions. In order to preserve this choice for its systems, Continental submits these comments to assist the Commission in its effort to implement Section 10 of the Act in a manner that will avoid unnecessary logistical and practical problems for operators and subscribers. Adoption of rules that recognize these problems could help prevent transforming this provision into a de facto ban on indecent programs.

Before discussing these practical problems, we address two threshold issues in these comments. First, because of cable operators' potential liability for obscene programming on PEG and leased access channels, already in effect as of December 4, 1992, we urge the Commission to adopt a regulatory scheme that minimizes cable operators' editorial intrusion in access programming so long as their liability is correspondingly minimized. Second, we ask the Commission to

clarify that all inconsistent franchise agreement provisions and local regulations are preempted.

I. THE COMMISSION SHOULD ADOPT RULES PERMITTING CABLE OPERATORS TO PROHIBIT CERTAIN TYPES OF PROGRAMMING IN A MANNER THAT MINIMIZES THE OPERATOR'S EDITORIAL INTRUSION AND, CORRESPONDINGLY, ITS RISK OF LIABILITY

The Act directs the Commission to adopt regulations within 180 days of passage of the Act enabling cable operators to prohibit the use of any PEG channel for programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[1] Within 60 days of passage of the Act (i.e., as of December 4), cable operators are subject to liability for carriage of obscene materials on the PEG channels.[2] In the NPRM, the Commission seeks comment on how cable operators can

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1 The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified as amended at 47 U.S.C. § 532) (hereinafter "Act").

2 As the Commission noted in its NPRM, the amendment to Section 638 of the Act, which eliminates cable operators' immunity for leased access and PEG channels, is self-implementing and therefore effective December 4, 1992. NPRM at ¶ 2. Until such time as the Commission adopts rules permitting cable operators to prohibit obscene programs from their PEG channels, therefore, cable operators are subject to liability for obscene programming on PEG channels without any corresponding authority to exclude such programming from the PEG channels. This raises substantial constitutional and operational concerns for operators. Nothwithstanding the above, cable programmers may already be found criminally liable for transmitting obscene material under 47 U.S.C. § 558.

categories of programming on PEG channels and on additional issues the Commission should consider.[3]

There are a number of issues the Commission should consider. First, the Commission should clarify that the Act permits operators to prohibit some, but not all, of the types of programs listed in Section 10(c) of the Act. Nothing in the language of the Act, for example, prevents an operator from excluding only a subset of the broad categories included in Section 10(c) from its PEG channels.

Second, Continental views as essential the Commission's suggestion that cable operators should be permitted to require certifications from PEG programmers that no materials falling into any of the statutory objectionable categories will be presented on the PEG channels.[4] Certification would minimize both the operator's editorial intrusion and operational burden. But these certifications can be relied on by the operator only if the Commission also makes clear that a cable operator who relies on such a certification has an affirmative defense to liability if

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3 Lest the Commission think that sexually explicit programming on PEG channels is never an issue, we note by way of example that public access programs on one Continental system have included a program in which an access user, frontally nude, urinated on a photograph of the President of the United States and another concerning safe sex that involved a graphic 45 minute demonstration of how to use a condom.

4 In the NPRM, the Commission states that certification by "users or operators" could be sought. NPRM at ¶ 14. Continental assumes the Commission intended to mean programmers and program providers.

material is later found to fall within a prohibited category, notwithstanding the programmer's prior certification to the contrary.[5]

If the Commission does not provide for programmer certification and permit those certifications to be an affirmative defense to liability, the cable operator must be permitted to (1) make its own determination, notwithstanding any certification, that material is obscene and should be excluded, (2) word its certification request in whatever form it desires -- e.g., all sexually explicit material, and (3) be held harmless for decisions to exclude material the operator reasonably believes to be obscene. If the cable operator is going to be held liable -- potentially criminally liable -- for obscene programming on the PEG channels even if a programmer certifies there is no such programming, then the operator must be afforded the discretion to exclude material that the operator reasonably believes to be obscene. And the operator must be permitted to ask for certification regarding a broader category of programming than obscenity -- "sexually explicit" material, for example -- so that the operator can

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5 Such a procedure would be consistent with the Commission's decision involving obscene or indecent programming carried on multipoint distribution service (MDS) systems, in which the Commission concluded that "there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Memorandum Opinion, Declaratory Ruling and Order, Docket No. 83-989, 2 FCC Rcd. 2819, 2820 (1987).

review the sexually explicit programs to decide if it reasonably believes any of it is obscene.[6]

Finally, the Commission should extend its rules governing a cable operator's ability to prohibit these kinds of programs on leased access channels. Specifically, cable operators should be expressly permitted to exclude from leased access channels obscene programs only and, if they so choose, to rely on certifications (with a defense against liability) to enforce such a policy.

II. THE COMMISSION SHOULD CLARIFY THAT ALL STATUTES OR REGULATIONS OF ANY STATE, FRANCHISING AUTHORITY OR OTHER LOCAL GOVERNING BODY THAT ARE INCONSISTENT WITH THE ACT AND COMMISSION'S REGULATIONS ARE PREEMPTED

Many state and local franchise authority regulations, as well as specific franchise agreement provisions, will be directly affected by the substantial alterations in the Act and the FCC's rules on indecent and obscene cable television programming on leased access and PEG channels. Many existing franchise agreements, for example, prohibit cable companies from exercising editorial control over the content of programming on these channels.[7] Because those franchise

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6 Although, as the Commission notes, these disputes involving PEG channels are frequently resolved at the local level, NPRM at ¶ 14, it is the Commission that has been directed to establish the regulatory framework.

7 The franchise agreement between Continental's Greater Dayton (Ohio) system and the Miami (Ohio) Valley cable Council provides, for example, that the cable operator (Footnote 7 Continued)

provisions are inconsistent with the provisions in the Act authorizing cable operators to prohibit or restrict certain types of programming on PEG and leased access channels, the Commission should clarify in its order that all inconsistent provisions in franchise agreements and state or local regulations are preempted by the new federal statutory provisions and implementing regulations, pursuant to the Section 656 of the Communications Act, 47 U.S.C. § 556.

There is a related issue the Commission should clarify. Pursuant to the enabling regulations of the local franchising authority (or in franchise agreements), many cable operators have entered into arrangements with independent access corporations whereby the operators sign over editorial control for programming on cable channels.[8] Frequently, the access corporations transmit live programs directly from their studios onto dedicated PEG channels. Many access agreements contain a provision indemnifying the cable operator for liability stemming from the actions of the corporation. These indemnification provisions, however, would not appear to (nor could they) protect the operator from criminal liability for

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(Footnote 7 Continued)
"shall exercise no control over program content on any of the access channels."

8 The franchise agreement between Continental Cablevision of Brockton, Inc. and the Brockton, Massachusetts, non-profit access corporation, for example, provides that the access corporation "shall have sole responsibility for determining access and scheduling of time on the allocated channels."

airing obscene material under the new liability provisions of the Act. Thus, the Commission should also provide that any contractual arrangements with independent access corporations, to the extent these provisions limit a cable operator's control over obscene or indecent programming, are also preempted by the Act.

III. THE COMMISSION MUST ADOPT REASONABLE REGULATIONS RESTRICTING INDECENT PROGRAMMING ON LEASED ACCESS CHANNELS OR THE RESULT WILL BE AN UNCONSTITUTIONAL *DE FACTO* BAN ON ALL INDECENT PROGRAMMING

The Act grants cable operators the choice of either: (1) prohibiting all indecent programming on leased access channels, or (2) restricting indecent (but not obscene) programming, pursuant to the regulations adopted by the Commission, to a single leased channel and restricting access to the indecent programming unless the subscriber requests access in writing.[9] Continental urges the Commission to adopt regulations that will in fact (not just in theory) preserve the local cable operator's choice to either prohibit or restrict such programming. If the Commission adopts regulations that are unreasonable, unduly cumbersome or costly, the result will be a *de facto* ban, which would be

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9 Act at § 10.

contrary to Congress' intent[10] and a clear violation of the Constitution.[11]

The Commission should, therefore, adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient channel usage, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to equip themselves and their customers so that they can comply with the requirements, (4) provide a reasonable notification period by program producers to allow cable operators time to restrict access to indecent programs, and (5) require a 30-day advance, written notice of a subscriber's desire to change access to indecent programming.

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10 See 138 Cong. Rec. S646,649 (daily ed. January 30, 1992). In discussing the provision of the Act permitting cable operators to prohibit indecent programming on leased access channels, the sponsor, Senator Jesse Helms, stated: "The pending amendment merely gives cable operators the legal right to make that decision. The amendment does not require cable operators to do anything. Therefore, let me say it again, this amendment does not in any way propose censorship." Id. at § 646.

11 See Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989) (statutory ban on indecent telephone messages violates the First Amendment); Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992) (ban on all radio and television broadcasts of indecent material violates the First Amendment).

A. The Commission Must Permit Cable Operators To Recover The Full Cost Of Complying With The Act

Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a de facto ban. Although the Commission does not seek comment on the magnitude -- or recovery -- of costs in this proceeding, these costs must be recoverable. We therefore describe these costs here, while recognizing that they may need to be considered in the ratemaking proceeding as well.[12]

The costs the cable operator will incur to comply with the single channel requirement are substantial. For example, if a system carries any indecent leased access programming, the operator will be required to purchase an additional scrambler at each head end and install positive traps for each subscriber wishing to receive the scrambled leased access channel containing indecent programming. Aside

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12 Additionally, in the ratemaking proceeding the Commission should consider the costs of prohibiting indecent and obscene programming (on both leased access and PEG channels), including the costs of monitoring programming and/or obtaining certifications from programmers.

from the actual costs of the scramblers and traps, there are the additional costs of installation, maintenance, inventory, and service. Perhaps the greatest cost will result from the possible need to provide a separate channel dedicated solely to indecent leased access programming. This change would in many cases also have a domino effect on other channels, requiring a number of other channel realignments. In addition to all of the costs related to subscriber notification, channel realignment could require the replacement (or reprogramming) of the tens of thousands of traps currently in place in non-addressable systems.

B. The Commission Should Define "Single Channel" In A Manner That Maximizes Efficient Use Of Channel Capacity

The Act clearly mandates the Commission to require a cable operator to aggregate all indecent leased access programs on a "single channel."[13] The Act does not, however, mandate that the Commission require the rest of that "single channel" be warehoused for indecent programming. The costs described above that would result from warehousing an entire channel could be mitigated if the Commission defines "single channel" in a manner that requires indecent programs to be carried (and scrambled) on a single channel but permits the operator to use the remainder of the channel for non-indecent (and non-scrambled) leased access programs. This is a far

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13 Act at 10(b).

more reasonable solution that still meets the mandate of protecting children.

Most of Continental's systems have few, if any, leased access program hours per year -- let alone per week or per day. If those systems were required to set aside an entire channel in order to carry a few hours of indecent programming each year, no one could afford to choose the single channel option and incur the associated disruptions and costs. Further, with channel space at a premium, cable operators cannot afford to devote two channels to leased access programming that would otherwise fit on a single leased access channel. Despite the proliferation of recent press articles concerning future promises of digital compression and other technologies, today's reality is that channel capacity for most cable systems is extremely limited and in high demand. Without the flexibility to scramble part of a "single channel," cable systems either would be forced to ban such programs or would encounter overwhelming economic costs and greatly disserve their subscribers, who would otherwise be able to receive an additional program service.

The Commission can mitigate the costs and burdens of restricting access by permitting the operator to aggregate and scramble all indecent leased access programming on a single channel, while still providing non-scrambled leased access programming the rest of the day on that same channel. Nothing in the Act or legislative history prevents the Commission from

defining "single channel" to permit this flexibility. Indeed, to define it in a way that would require unnecessarily inefficient use of channel capacity would essentially ensure that cable operators would have no choice but to opt for a prohibition, thereby converting the option into a de facto ban in direct contravention of congressional intent and constitutional mandates.

C. The Commission Should Delay The Effective Date Of The Rules Relating To The Single Channel Requirement To Permit Implementation

In light of the technical changes that will need to be made, both at the cable head end to scramble the signal and at the customers' premises to replace and provide properly programmed traps, cable operators must be afforded sufficient lead time to implement the single channel requirement. Continental requests that the Commission exercise its authority under the Act and delay the effective date of the regulations related to the single leased access channel for 120 days after the final regulations are adopted.[14] During this time, the cable operators will be able to purchase and install the necessary equipment in order to comply with the

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14 Unlike other provisions of the Act, the provisions governing single access channel restrictions are not self-executing. While Congress provided that the Commission must enact regulations within 120 days of passage of the Act, it did not specify the date by which time the regulations must become effective.

regulations, as well as to engage in consumer education to inform subscribers of the changes in cable operations.

Given the enormous changes that must be made to cable systems to implement the single channel requirement, a 120-day implementation period should be provided. Continental Cablevision of Greater Dayton (Ohio) is a typical non-addressable system. In order to meet the single channel requirement, the Greater Dayton system would first have to identify a separate channel for indecent leased access programming, which would also likely entail channel repositioning. It would then need to scramble that channel, order the necessary traps, and then deploy service trucks and service technicians to install those positive traps in all homes in which subscribers affirmatively requested the programming.

Even in addressable systems, a 120-day implementation period is needed. Because virtually no currently installed addressable cable converter scrambles the audio portion of the television signal, addressable systems would still need to purchase a jamming type of scrambler and install positive traps. Indeed, in some fashion the burden in addressable systems would be greater. Having invested in advanced addressable technology precisely to avoid the expense of buying and physically installing traps, systems with addressable technology would now have to purchase test

equipment and traps solely for the purpose of scrambling indecent leased access programming.

The operator's ability to take these implementation steps, in both addressable and non-addressable systems, within the 120-day period will depend in large part on factors beyond its control, e.g., the volume of subscribers who want to receive the indecent programs and the availability of scramblers and traps for purchase. Given these uncertainties, Continental urges the Commission to adopt a 120-day effective date, with provisions for a waiver upon a showing of good cause that the implementation period, on a case-by-case basis, must be extended.

Without such a lead time, cable operators will be unable to comply with the single channel requirement and will have no choice but to prohibit all indecent programs. The result, in violation of the Act and the Constitution, would be a de facto ban.

D. The Commission Should Impose A 45-Day Notification Requirement By Leased Access Programmers With Indecent Programming

Under the Act, programmers are required to inform cable operators if the material to be presented on the leased channel contains indecent material.[15] The Commission requests comment on "what would be a reasonable time frame for the

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15 Act at § 10(b).

required notification by a program provider to the cable operator. . . ."[16] In the proposed regulations, however, the Commission, without any explanation, proposes seven days as a "reasonable timeframe" for the requisite notice to the cable operator.[17]

Quite simply, seven days is not a reasonable or sufficient amount of time for the cable operators to receive notification of indecent programming and arrange to move such programming to a single channel and scramble it pursuant to a programmer's notification. For example, even if a program is certified as indecent, operators may still need to review it to be certain there is no obscene material. See supra at 4-6. Furthermore, in certain communities such as University City, Missouri, Continental provides government authorities with a monthly guide to the next month's leased and PEG access programming. This guide is published as much as one month prior to some access programming, requiring substantial advance notice from programmers.

The Commission also asks "whether such notification should be made in writing."[18] Continental urges the Commission to require programmers to provide such notification in writing to the local cable system. By so doing, there will be less likelihood of miscommunications. Further, in

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16 NPRM at ¶ 12.

17 NPRM at Appendix A, Part 76 2(c).

18 NPRM at ¶ 12.

Continental's view it is essential that a cable operator "be held harmless from liability . . . if it does not receive any, or timely, notification from a programmer."[19] Any other rule would be grossly unfair in light of the Commission's conclusion that "[u]nder Section 10 it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel."[20]

E. The Commission Should Require A 30-Day Advance Written Notice Of A Subscriber's Desire To Change Access To Indecent Programming

A final issue the Commission should address concerns the timing and form of the notice subscribers must give to the cable operator if subscribers wish to change the status of their access to indecent programming on leased access channels. In particular, cable operators must have sufficient time to comply with a subscriber's request to block access to the indecent programming that had previously been transmitted to the subscriber's home pursuant to the subscriber's consent. In the absence of such a rule, an operator could be held liable for transmitting indecent programming in violation of the Commission's rules.

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19 Id.

20 Id. at ¶ 10.

Continental urges the Commission to adopt a rule giving the operating company 30 days to implement a customer's request to change access to indecent programming. During this time period, the operator will be able to install or remove the individual trap from the subscriber's home. Further, the Commission should clarify in its order that cable operators will not be held liable during this 30-day period if a subscriber continues to receive unscrambled indecent programming.

Finally, to protect against fraud and miscommunications, the Commission should permit operators to require that all subscriber requests to change their access to indecent programs be in writing and include the name, address and account number of the subscriber. Such a requirement will help eliminate the possibility that unauthorized people will make fraudulent requests to the cable company to unscramble indecent programming at another subscriber's home.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Commission implement regulations on indecent and obscene cable programming that (1) provide operators with sufficient power to prohibit obscene programming on PEG and leased access channels in a minimally intrusive manner, (2) preempt inconsistent state and local regulations and franchise agreements, and (3) do not impose onerous cost or

procedural burdens, thereby resulting in a de facto ban on indecent programming on leased access channels.

Respectfully submitted,

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